

SENATE BILL 2408
By Person, Curtis

AN ACT to amend Tennessee Code Annotated, Title 35
and Title 66, relative to fiduciaries and trust
estates and the Tennessee uniform statutory rule
against perpetuities.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 35, is amended by adding Sections 2
through 11 of this act as a new chapter titled "Tennessee Preservation Trusts".

SECTION 2. As used in this chapter:

(1) "Claim" means a right to payment, whether or not the right is reduced to
judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed,
undisputed, legal, equitable, secured or unsecured;

(2) "Creditor" means, with respect to a transferor, a person who has a claim;

(3) "Debt" means liability on a claim;

(4) "Disposition" means a transfer, conveyance or assignment of property
including a change in the legal ownership of property occurring upon the substitution of
one (1) trustee for another or the addition of one (1) or more new trustees. "Disposition"
also includes the exercise of a power so as to cause a transfer of property to a trustee or
trustees, but shall not include the release or relinquishment of an interest in property that
until the release or relinquishment was the subject of a qualified disposition;

(5) "Investment advisor" means a person given authority by the terms of a
Tennessee preservation trust to direct, consent to or disapprove a transferor's actual or
proposed investment decisions, distribution decisions or other decisions of the
transferor;

(6) "Investment decision" means the retention, purchase, sale, exchange, tender or other transaction affecting the ownership of or rights in investments.

(7) "Person" has the meaning ascribed to it in § 1-3-105(19);

(8) "Property" includes real property, personal property, and interests in real or personal property;

(9) "Qualified affidavit" means a sworn affidavit signed by the transferor before a disposition of assets to a Tennessee Preservation Trust that meets the requirements of Section 3. In the event of a disposition by a transferor who is a trustee, the affidavit shall be signed by the transferor who made the original disposition to such trustee, or a predecessor trustee, in a form that meets the requirements of subdivisions (12)(B) and (12)(C) and shall state facts as of the time of such original disposition;

(10) "Qualified disposition" means a disposition by or from a transferor with or without consideration, to a Tennessee Preservation Trust after the transferor executes a qualified affidavit;

(11) "Qualified trustee" means a person who:

(A) In the case of a natural person, is a resident of this state, or, in all other cases, is authorized by the law of this state to act as a trustee and whose activities are subject to supervision by the Tennessee department of financial institutions, the federal deposit insurance corporation, the comptroller of the currency, or the office of thrift supervision or any successor thereto; and

(B) Maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition, maintains records for the Tennessee Preservation Trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of required income tax returns for the Tennessee

Preservation Trust, or otherwise materially participates in the administration of the Tennessee Preservation Trust; and

(C) Is not the transferor.

(12) "Tennessee preservation trust" means an instrument appointing a qualified trustee or qualified trustees for the property that is the subject of a disposition, which instrument:

(A) Expressly incorporates the law of this state to govern the validity, construction and administration of the trust;

(B) Is irrevocable; and

(C) Provides that the interest of the transferor or other beneficiary in the trust property or the income therefrom may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before the qualified trustee or qualified trustees actually distribute the property or income therefrom to the beneficiary; and

(13) "Transferor" means a person who, as an owner of property, is a holder of a power of appointment which authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate or the creditors of the holder's estate, or as a trustee, directly or indirectly makes a disposition or causes a disposition to be made.

SECTION 3. A qualified affidavit shall state that:

(1) The transferor has full right, title, and authority to transfer the assets to the trust;

(2) The transfer of the assets to the trust will not render the transferor insolvent;

(3) The transferor does not intend to defraud a creditor by transferring the assets to the trust;

(4) The transferor does not have any pending or threatened court actions against the transferor, except for those court actions identified by the transferor on an attachment to the affidavit;

(5) The transferor is not involved in any administrative proceedings except for those administrative proceedings identified on an attachment to the affidavit;

(6) The transferor does not contemplate filing for relief under the provisions of the federal bankruptcy code; and

(7) The assets being transferred to the trust were not derived from unlawful activities.

SECTION 4.

(a) Notwithstanding any provision of law to the contrary, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a qualified disposition to a Tennessee Preservation Trust or for the avoidance of a qualified disposition to a Tennessee Preservation Trust unless such action shall be brought pursuant to the provisions of the Uniform Fraudulent Transfer Act, compiled in title 66, chapter 3, part 3. A creditor has the burden to prove the matter by clear and convincing evidence in any action brought pursuant to the Uniform Fraudulent Transfer Act

(b) A creditor's claim under subsection (a) of this section shall be extinguished unless:

(1) The creditor's claim arose before the qualified disposition to a Tennessee Preservation Trust was made, and the action is brought within the limitations of § 66-3-310 in effect on the date of the qualified disposition; or

(2) Notwithstanding the provisions of § 66-3-310, the creditor's claim arose concurrent with or subsequent to the qualified disposition and the action is brought within four (4) years after the qualified disposition is made.

(c) For purposes of this chapter, a qualified disposition that is made by means of a disposition by a transferor who is a trustee shall be deemed to have been made as of the time, whether before, on or after July 1, 2006, the property that is the subject of the qualified disposition was originally transferred to the transferor acting in the capacity of trustee, or any predecessor trustee, in a form that meets the requirements of subdivisions (12)(B) and (12)(C) of Section 2.

(d) Notwithstanding any provision of law to the contrary, a creditor, including a creditor whose claim arose before or after a qualified disposition, or any other person shall have only such rights with respect to a qualified disposition as are provided in this section and Section 6, and no such creditor nor any other person shall have any claim or cause of action against the trustee, or an advisor of a Tennessee Preservation Trust, or against any person involved in the counseling, drafting, preparation, execution or funding of a Tennessee Preservation Trust. For purposes of this section, counseling, drafting, preparation, execution or funding of a Tennessee Preservation Trust includes the counseling, drafting, preparation, execution and funding of a limited partnership or a limited liability company if interests in the limited partnership or limited liability company are subsequently transferred to the Tennessee Preservation Trust.

(e) Notwithstanding any provision of law to the contrary, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity against a trustee or an advisor of a Tennessee Preservation Trust, or against any person involved in the counseling, drafting, preparation, execution or funding of a Tennessee Preservation

Trust, if, as of the date such action is brought, an action by a creditor with respect to such Tennessee Preservation Trust would be barred under this section.

(f) In circumstances where more than one (1) qualified disposition is made by means of the same Tennessee Preservation Trust, then:

(1) The making of a subsequent qualified disposition shall be disregarded in determining whether a creditor's claim with respect to a prior qualified disposition is extinguished as provided in subsection (b); and

(2) Any distribution to a beneficiary shall be deemed to have been made from the latest such qualified disposition.

(g) If, in any action brought against a Tennessee Preservation Trust, a court takes any action whereby such court declines to apply the law of this state in determining the validity, construction or administration of such Tennessee Preservation Trust, or the effect of a spendthrift provision thereof, the trustee of such trust shall immediately upon such court's action and without the further order of any court, cease in all respects to be trustee of such trust and a successor trustee shall thereupon succeed as trustee in accordance with the terms of the trust or, if the trust does not provide for a successor trustee and the trust would otherwise be without a trustee, a court of this state, upon the application of any beneficiary of such trust, shall appoint a successor trustee upon such terms and conditions as it determines to be consistent with the purposes of such trust and this act. Upon such trustee's ceasing to be trustee, such trustee shall have no power or authority other than to convey the trust property to the successor trustee named in the trust in accordance with this section.

(h) A Tennessee Preservation Trust shall be subject to this section whether or not the transferor retains any or all of the powers and rights described in Section 11 or serves as an investment advisor pursuant to Section 9.

SECTION 5. A transferor shall have only such powers and rights as are conferred by the Tennessee Preservation Trust. Except as permitted by Section 11 and Section 9, the transferor shall have no rights or authority with respect to the corpus of the Tennessee Preservation Trust or the income therefrom, and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority shall be void.

SECTION 6. (a) A qualified disposition to a Tennessee Preservation Trust shall be avoided only to the extent necessary to satisfy the transferor's debt to the creditor at whose instance the disposition had been avoided, together with such costs, including attorneys' fees, as the court may allow.

(b) In the event any qualified disposition shall be avoided as provided in subsection (a), then:

(1) If the court is satisfied that a qualified trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition:

(A) Such qualified trustee shall have a first and paramount lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorneys' fees, properly incurred by such qualified trustee in the defense of the action or proceedings to avoid the qualified disposition;

(B) The qualified disposition shall be avoided subject to the proper fees, costs, preexisting rights, claims and interests of such qualified trustee and of any predecessor qualified trustee that has not acted in bad faith; and

(C) For purposes of this subdivision, it shall be presumed that such qualified trustee did not act in bad faith merely by accepting such property; and

(2) If the court is satisfied that a beneficiary of a Tennessee Preservation Trust has not acted in bad faith, the avoidance of the qualified disposition shall be subject to the right of such beneficiary to retain any distribution made upon the exercise of a trust power or discretion vested in the qualified trustee or qualified trustees of such Tennessee Preservation Trust, which power or discretion was properly exercised prior to the creditor's commencement of an action to avoid the qualified disposition. For purposes of this subdivision, it shall be presumed that the beneficiary, including a beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the trust.

(c) A disposition by a trustee that is not a qualified trustee to a trustee that is a qualified trustee shall not be treated as other than a qualified disposition solely because the trust instrument fails to meet the requirements of subdivision (12)(A) of Section 2.

(d) In the case of a disposition to more than one (1) trustee, a disposition that is otherwise a qualified disposition shall not be treated as other than a qualified disposition solely because not all of the recipient trustees are qualified trustees.

SECTION 7. A spendthrift provision as described in subdivision (12)(C) of Section 2 shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code (11 U.S.C. § 541(c)(2)) or any successor provision thereto.

SECTION 8. (a) For purposes of this chapter, neither the transferor nor any other natural person who is a nonresident of this state nor an entity that is not authorized by the law of

this state to act as a trustee or whose activities are not subject to supervision as provided in subdivision (11)(A) of Section 2 shall be considered a qualified trustee; however, nothing in this chapter shall preclude a transferor from appointing one or more advisors, including but not limited to:

(1) Advisors who have authority under the terms of the trust instrument to remove and appoint qualified trustees or trust advisors;

(2) Advisors who have authority under the terms of the trust instrument to direct, consent to or disapprove distributions from the trust; and

(3) Investment advisors, whether or not such advisors would meet the requirements imposed by subdivisions (11) of Section 2.

(b) For purposes of this subsection, the term "advisor" includes a trust "protector" or any other person who, in addition to a qualified trustee, holds one (1) or more trust powers.

SECTION 9. A person may serve as an investment advisor notwithstanding that such person is the transferor of the qualified disposition, but such a person may not otherwise serve as advisor to a trust that is a qualified disposition except with respect to the retention of the veto right permitted by subdivision (1) of Section 11.

SECTION 10. In the event that a qualified trustee of a Tennessee Preservation Trust ceases to meet the requirements of subdivision (11)(A) of Section 2, and there remains no trustee that meets such requirements, such qualified trustee shall be deemed to have resigned as of the time of such cessation, and thereupon the successor qualified trustee provided for in the Tennessee Preservation Trust shall become a qualified trustee of the Tennessee Preservation Trust, or in the absence of any successor qualified trustee provided for in the Tennessee Preservation Trust, then a court of this state shall, upon application of any interested party, appoint a successor qualified trustee.

SECTION 11. A Tennessee Preservation Trust shall not be deemed revocable on account of its inclusion of one (1) or more of the following:

- (1) A transferor's power to veto a distribution from the trust;
- (2) A power of appointment (other than a power to appoint to the transferor, the transferor's creditors, the transferor's estate or the creditors of the transferor's estate) exercisable by will or other written instrument of the transferor effective only upon the transferor's death;
- (3) The transferor's potential or actual receipt of income, including rights to such income retained in the trust;
- (4) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as such terms are defined in § 664 of the Internal Revenue Code of 1986 (26 U.S.C. § 664) and any successor provision thereto;
- (5) The transferor's receipt each year of an amount specified in the trust, such amount not to exceed five percent (5%) of the initial value of the trust or its value determined from time to time pursuant to the trust;
- (6) The transferor's potential or actual receipt or use of principal if such potential or actual receipt or use of principal would be the result of a qualified trustee's or qualified trustees' acting:
 - (a) In such qualified trustee's or qualified trustees' discretion. For purposes of this section, a qualified trustee is presumed to have discretion with respect to the distribution of principal unless such discretion is expressly denied to such trustee by the terms of the trust;

(b) Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a substantially unfettered right to the receipt or use of the principal; or

(c) At the direction of an advisor described in Section 8 who is acting:

(i) In such advisor's discretion; or

(ii) Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a substantially unfettered right to the receipt of or use of principal.

(7) The transferor's right to remove a trustee or advisor and to appoint a new trustee or advisor; provided, however, that such right shall not include the removal of a person who is a related or subordinate party with respect to the transferor within the meaning of § 672(c) of the Internal Revenue Code of 1986 (26 U.S.C. § 672(c)) and any successor provision thereto;

(8) The transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of such term as described in § 2702(c) of the Internal Revenue Code of 1986 (26 U.S.C. § 2702(c)) and any successor provision thereto.

SECTION 12. Sections 2 through 11 shall apply to qualified dispositions to Tennessee Preservation Trusts and dispositions by transferors who are trustees made on or after July 1, 2006.

SECTION 13. The first sentence of Tennessee Code Annotated, Section 35-15-505(a)(2), is amended by deleting in its entirety and by substituting instead the following:

Except as provided in Sections 2 through 11 of this act regarding Tennessee Preservation Trusts, a creditor or assignee of the settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the settlor's benefit.

SECTION 14. Tennessee Code Annotated, Section 66-1-202, is amended by adding the following new subsection (f):

(f) As to any trust created after June 30, 2006, or that becomes irrevocable after June 30, 2005, this section shall apply to a nonvested property interest or power of appointment contained in a trust by deleting the language “ninety (90) years” and by substituting instead the language “three hundred sixty (360) years” whenever such language appears in this section, unless the terms of the trust require that all beneficial interests in the trust vest or terminate.

SECTION 15. This act shall take effect July 1, 2006, the public welfare requiring it.